FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

75-1906

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Auburn, New York,

Petitioner,

against

BARRY WARREN KIBBE,

Respondent.

REPLY BRIEF

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A.

Respondent assumes that it would have been to his advantage if the jury had received specific instructions on the "extremely complex" subject of causation—particularly on the issue of foreseeability. The Court of Appeals agreed (A. 116) and, indeed, went a step further, concluding that:

> "Given the proper standard for causation, the jury could have found that Blake had been so reckless as to absolve defendants of legal responsibility for Stafford's death." (A. 114).

The assumption is unwarranted.

Aside from the fact that there is no one "proper" standard for determining causation (Ryu, "Causation in Criminal Law," 106 U. Pa. L. Rev. 773, 803 [1958]), let

alone one that is constitutionally required, it is evident from the record that a more precise instruction as to causation would have focused the issue in such a way as to preclude acquittal. This would have been true whether or not the instruction was framed in accordance with New York law or modelled after LaFave & Scott, Handbook on Criminal Law (1972), the treatise relied upon by the court below.* This may explain why neither defense counsel saw fit to object to the charge on this ground at trial or, subsequently, on appeal.

It is clear that at the time of respondent's trial a defendant was criminally responsible under New York law where an intervening agency was the immediate cause of death unless "death [was] *solely* attributable to the secondary agency, *and not at all induced by the primary one.*" *People* v. *Kane*, 213 N.Y. 260, 270, 107 N.E. 655, 657 (1915) (emphasis supplied). *Accord, People* v. *Stewart*, 40 N Y 2d 692, 697, —— N.E. 2d —— (1976). The New York Court of Appeals reasoned that this conclusion was consistent with the principle that "'every person is to be held to contemplate and to be responsible for the natural consequences of his own acts.'" *People* v. *Kane*, 213 N.Y. at 274.

Significantly, under New York law negligence on the part of the intervening agency is recognized as one of the "natural consequences" of the defendant's acts and such negligence does not excuse the defendant of liability for the homicide (*People* v. *Kane*, 213 N.Y. at 274-277), at least where the defendant's acts were dangerous to life, as respondent has acknowledged his to have been.** See generally Zett, 8 New York Criminal Practice at 69-5 to 69-8 (1976).

* This Court is of course bound by New York's construction of its own criminal laws. *E.g. Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975).

** In the instant case, both respondent and his attorney acknowledged that, under the circumstances, the act of leaving Stafford was dangerous to life, i.e. it was foreseeable that he might freeze to death (Tr. 839, 995).

Therefore, a detailed charge under New York law would have instructed the jury that although (a) respondent's conduct was not the immediate cause of death and (b) the intervening agency was negligent, respondent was nevertheless responsible if it was foreseeable that Stafford might be struck by a car. See *People* v. *Kibbe*, 35 N Y 2d 407, 412-413, 321 N.E. 2d 773, 776 (1974). It is difficult to see how such a charge would have been helpful to respondent. On the contrary, such a charge plainly would been to respondent's disadvantage since it would have deprived him of any opportunity to use Blake's negligence to sway the jury.

Nor would respondent have been in any better position if the trial court had charged the jury in accordance with hornbook law. Thus, assuming that the jury had received explicit instructions, pursuant to LaFave & Scott, about the difference between intervening causes which are coincidences and those which are responses, ultimately the court would have been required to charge that "a coincidence will break the chain of legal cause *unless it was foreseeable*" (LaFave & Scott, p. 258) (emphasis supplied).

In the instant case, the evidence of foreseeability was overwhelming. Moreover, as the Second Circuit itself found, the trial court "scrupulously instructed the jury with respect to the meaning of 'recklessly' . . . [and] 'grave' [risk of death]" (A. 113), both of which go to the issue of foreseeability and both of which the jury, by its verdict, found to be present beyond a reasonable doubt.*

* Respondent, in disputing foreseeability, urges that the road was "lightly trafficked," implying that very few cars used it. (Respondent's Br., p. 22). The evidence at trial is to the contrary. Although respondent understandably denied that there were cars on the road when Stafford was abandoned (Tr. 854), his co-defendant stated there were cars going in both directions at the time, although "there weren't so many" (Tr. 845). In addi-

(footnote continued on following page)

Significantly, LaFave & Scott (p. 260) give as an example of a *foreseeable* coincidence the following:

> "A, with intent to kill B, only wounds B, leaving him lying unconscious in the unlighted road on a dark night, and then C, driving along the road, runs over and kills B. Here C's act is a matter of coincidence rather than a response to what A has done, and thus the question is whether the subsequent events were foreseeable, as they undoubtedly were in the above illustration."

It is true that in a footnote the authors hypothesize that A might not be liable "if C were driving in a *reckless* way" (p. 260 n. 73). However, until the Second Circuit issued its opinion, there was never any suggestion that Blake was *reckless*. Certainly this was not the position of the defense at trial. On the contrary, the defense simply attempted to suggest that Blake was negligent and that this alleged negligence was not a foreseeable consequence of the defendants' actions in abandoning Stafford as they did* (A. 68).

(footnote continued from preceding page)

tion, at the time of the accident there were at least three cars on the road (including Blake's), and Blake testified that afterwards "other passersby were coming along" and he requested help (Tr. 620). Finally, it is relevant that Stafford was not abandoned in the early morning hours when traffic would be at its lightest, but at 9:30 P.M.

In addition, respondent's theory of foreseeability fails to take into account the fact that both defendants acknowledged that it was dark at the spot where they left Stafford (Tr. 846, 854), the fact that Stafford did not have his glasses and the fact that to get to the gas station Stafford would have had to cross the road.

* Respondent continues to rely upon the theory that he is not responsible because he could not precisely foresee the details of the immediate cause of death. The argument is frivolous since the law does not require this degree of clairvoyance. See, e.g., *People* v. *Parody*, 248 App. Div. 269, 271, 289 N.Y.S. 929, 931 (4th Dept. 1936). In the instant case, the question of foreseeability was not whether respondent could have foreseen death by vehicle as it actually happened, but simply whether he could have foreseen death by vehicle.

The difference between recklessness and mere negligence is apparent and the facts of this case do not support any theory of recklessness by Blake under New York law (See *People* v. *Eckert*, 2 NY 2d 126, 130, 138 N.E. 2d 794, 797, 157 N.Y.S. 2d 551, 556 (1956), *People* v. *Bearden*, 290 N.Y. 478, 483, 49 N.E. 2d 785, 788 (1943)) as the defense itself recognized and the Court of Appeals concluded in this case. *People* v. *Kibbe*, 35 N Y 2d at 413. Accordingly, the court below, which failed to draw this distinction, erroneously concluded that the jury "could have found that Blake had been so reckless as to absolve [respondent] of legal responsiiblity" (A. 114). In essence, the Court boot-strapped itself to its theory that respondent may have been prejudiced by the failure of the trial court to elaboarte on the question of causation. See *Gryger* v. *Burke*, 334 U.S. 728, 731 (1948).

B.

Equally without merit is respondent's contention that the jury should have been instructed to take Stafford's conduct into account in evaluating foreseeability since "Stafford, for reasons of his own, may have decided not to seek accessible shelter at the gas station" (Respondent's Br., p. 23). This is not the law in New York. In *People* v. *Kane, supra*, 213 N.Y. at 271-275, 107 N.E. at 658-659, the Court of Appeals cited with approval a number of cases holding that a defendant is responsible if he inflicts a dangerous wound and death ensues, even though it appears that death might have been avoided had the victim acted differently. Therefore, respondent was not entitled to the instruction he now seeks.

In any event, respondent's theory is totally unrealistic, as is the suggestion that Stafford may have been contributorily negligent. It is clear from the record that Stafford was helplessly drunk when he was abandoned and both New York appellate courts so found. Respondent himself acknowledged in his statement to the police that Stafford was "drunk" and fell into a snowbank imme-

diately upon leaving the car (Tr. 853).* Half an hour later, Stafford was hit by Blake in the middle of the lane on the *same* side of the highway as he had been left by respondent. Although Stafford was conscious when Blake saw him, he was apparently unable even to stand up or to appreciate that he was in the road and therefore in danger. In short, the record is devoid of any evidence that Stafford was capable of affecting his fate.

Respondent argues that because Stafford asked to be let out of the car he was "alert enough to perceive a place of safety" and therefore, it was not foreseeable that he would not take advantage of it (Respondent's Br., p. 22). The record does not support this conclusion. Although respondent's co-defendant Krall testified that Stafford asked to be let out at the store" (A. 66), according to respondent's version of what happened, *he* had told Stafford to get out of the car. In any event, Krall's testimony is implausible. At the time Stafford allegedly made his request he was seated in the rear seat of the car on the passenger side and apparently was not wearing his glasses. The two defendants were in the front seat. Both the store and the gas station were on the far side of the road and ahead of the car. In order to let Stafford out 75 feet away from these structures, Stafford would have had to make his request when the car was considerably further away than 75 feet and therefore when he was even less likely to see them. Significantly, this testimony by Krall was the only evidence placing Stafford close to help. All the other evidence indicated that he was left ¼ mile away from the gas station.

C.

Insofar as respondent maintains that the jury may have been misled on the issue of causation because the prosecution argued a "but-for" theory of responsibility, he simply relies upon one statement by the District Attorney and ignores the rest of the prosecution's arguments to the jury

* Respondent specifically denied pushing Stafford.

in summation and throughout the trial. When read in context, it is evident that the "but-for" element of causation—which respondent himself admits is relevant (Respondent's Br., p. 20)—was not unduly emphasized. Certainly it was not error under New York law to bring the "but-for" element to the jury's attention. See *Cox* v. *The People*, 80 N.Y. 500, 516 (1880).

D.

The jury in this case was presented with an undisputed picture of a helplessly drunk, partially undressed man abandoned in near zero weather on a dark, rural highway *at least* 75 feet from the closest lighted structure which was on the opposite side of the road. In the face of this evidence, and without reference to New York law, respondent speculates abstractly about the possible advantage to him of a detailed instruction on causation. This type of speculation does not provide a sufficient basis upon which to set aside a state court criminal conviction, particular when a) New York law is contrary to respondent's theories and b) every court which reviewed the conviction—including the one that set it aside—found that there was sufficient evidence in the record to sustain the conviction of the crime charged.

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Respectfully submitted,

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